The appeal is hereby allowed.

The result of the appeal may now be stated. It succeeds in part and fails in part. It succeeds insofar as we are of the opinion that no irrevocable licence coupled with an interest existed and that no equitable estoppel had been established in favour of the respondent. But it fails inasmuch as we are of the opinion that the respondent was not a trespasser. It follows that neither the order of the trial Magistrate nor the order of the High Court can stand. The order of the High Court should be discharged and the order of the trial Magistrate should be varied as hereafter indicated.

The revocable licence of the defendant had been duly determined and judgment is entered in favour of the plaintiff. The defendant is ordered to deliver up vacant possession of that one half portion of the land held under Suratan Hakmilik Sementara No. HS(M) Slim 81/73 for P.T. No. 122 in Kampong Baru, Slim River in the Mukim of Slim, State of Perak to the plaintiff within six months from the date hereof. Having regard to the circumstances of this case, we order that each party to pay his/her own costs here and in the courts below. The deposit of $500.00 to be refunded to the appellant.

Order accordingly.

Solicitors: *J.S. Olikh & Co.; Lim Seong Chun & Co.*

MOSBERT BERHAD (IN LIQUIDATION) v. STELLA D'CRUZ

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah. S.C.JJ.) March 13 & July 13, 1985]

[Johore Bahru – Federal Court Civil Appeal No. 108 of 1984]

Company Law – Action against company in liquidation – Leave of court to be given on inter partes summons – Leave given on ex parte summons – Official Receiver heard on summons to set aside order – No substantial injustice caused – Whether leave should be granted – Companies Act, 1965, ss. 226(3) & 355.

Land Law – Private caveat – Claim to registrable interest in portion of land – Caveat may be on whole land provided effect limited to portion of land – Caveat removed – National Land Code, s. 322 & 417.

This was an appeal against the decision of the judge of the High Court who gave leave to the respondent to prosecute her claim against the appellant, a company in liquidation on an *ex parte* application pursuant to section 226(3) of the Companies Act. It was also argued that the private caveat lodged by the respondent was defective or void in that it purported to caveat the whole of the property when the caveator was only claiming an interest in a small portion thereof.

Held: (1) the application under section 226(3) of the Companies Act should be made *inter partes* so that the summons could be served on the Official Receiver who should be heard before the discretion of the Court is exercised;

(2) in this case although leave was given on an *ex parte* application, the Official Receiver was represented and heard on the application to set aside the order. No substantial injustice had therefore been caused to the appellant;

(3) the Court will give the applicant leave if his claim cannot be dealt with adequately in the winding up or if satisfied that the remedy he seeks cannot be given to him in a winding up proceedings. The learned Judge in this case had applied the correct test in giving the respondent leave to commence proceedings in respect of her claim to the private lot of land;

(4) it was plain that that the private caveat lodged in this case was intended to forbid the registration of any dealing affecting the whole land and was not confined to the private lot in respect of which the claim was made. The respondent was not entitled to lodge such a caveat when she is claiming a particular interest in a portion of the land. The order extending the validity of the private caveat lodged by the respondent should therefore be set aside and an order made that the caveat be removed from the register.

Cases referred to:

(1) *Mosbert Berhad (In Liquidation)* v. *Chatib bin Kari* [1985] 1 M.L.J. 162.
(2) *Western & Brazilian Telegraph Co.* v. *Bibby* (1880) 42 L.T. 821.
(3) *Re Cuthbert Lead Smelting Co.* (1886) W.N. 84.
(4) *Tee Chin Yong* v. *Ernest Jeff* [1963] M.L.J. 118.
(5) *Woo Yok Wan* v. *Loo Pek Chee* [1975] 1 M.L.J. 156.
(6) *Pok Kew Chai* v. *Yeoh Thian Seng & Ors.* [1975] 1 M.L.J. 220.
(7) *Vangedaselam* v. *Mahadevan & Anor.* [1976] 2 M.L.J. 161.
(8) *Tan Thean Choo* v. *Cheah Kah Seong & Anor.* [1977] 2 M.L.J. 106.
(9) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212.

SUPREME COURT.

P. Suppiah for the appellants.
G. Puthucheary for the respondent.
Siti Zaleha binti Sheikh Abubakar for the Official Receiver.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): The material facts which give rise to this

appeal are substantially the same as those in the Federal Court case of *Mosbert Bhd. (In Liquidation)* v. *Chatib bin Kari*[1] and in giving the judgment of the Federal Court the Lord President has set out the relevant facts succinctly, so there is no need to repeat them here. Suffice to say that the two main issues connected with this appeal appear to have been raised and decided by the Johore Baru High Court, where Shankar J. granted leave to both Chatib and Farland to commence proceedings against the Mosbert Bhd. (In Liquidation) (hereinafter referred to as the appellant) under section 226(3) of the Companies Act 1965 and further made a Consent Order extending the validity of the respective caveats lodged by Chatib and Farland until the final disposal of the suits filed by them after the Official Receiver had agreed to it. The Official Receiver seemed to have resiled from this and took out a summons to set aside the Consent Order. When the learned judge dismissed the application there was an appeal to the Federal Court vide Civil Appeal Nos. 7/84 and 75/84. In that appeal the Federal Court upheld the decision of the learned judge. Here the principal complaint of the appellant may be summarised into 2 main grounds of appeal. First, it was submitted that the learned judge was wrong in law in granting leave to D'Cruz Stella (f) (hereinafter called the respondent) to prosecute her claim against the appellant on an *ex parte* application pursuant to section 226(3) of the Companies Act 1965. Secondly, learned counsel argued that the private caveat lodged by the respondent was defective or void in that it purported to caveat the whole of the property when the caveator is only claiming an interest in a small portion thereof.

Now section 226(3) reads:

"When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except –

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes."

The question therefore arises whether "leave of the Court" should be obtained by way of (a) an *ex parte* summons-in-chambers or (b) *inter partes* summons. In *re Western & Brazilian Telegraph Co.* v. *Bibby*[2] Jessel M.R. was reported to have said that leave to commence an action against a company in liquidation should not be given on an *ex parte* application. No reason was given by the learned Master of the Rolls. But in our opinion, this practice of the Court should be adopted and followed for these reasons, *viz.*, it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. It is for this reason that application under section 226(3) of the Companies Act 1965 should be made *inter partes* so that the summons could be served on the Official Receiver who should be heard before the discretion of the Court is exercised. Without hearing the Official Receiver the Court cannot be said to have exercised the discretion judicially.

Although we agree with the submission of learned counsel for the appellant that leave under section 226(3) should not be given on an *ex parte* application we are constrained to point out that on a subsequent summons taken out by the appellant to set aside the Court order, the Official Receiver was represented by learned counsel at the hearing and addressed the Court on the merits of the application. On perusing the record of appeal we are satisfied that the learned judge was right to reaffirm his decision to grant leave after the views of the Official Receiver had been heard and considered. Notwithstanding that the giving of leave to commence legal proceedings against the appellant on the *ex parte* application of the respondent constituted an irregularity we are further satisfied that no substantial injustice had been caused to the appellant in any way [see section 355(1) of the Act], and we find that there is no merit in this ground of appeal. In *re Cuthbert Lead Smelting Co. Ltd.*[3] it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings. We think the learned judge had applied the correct test laid down in *Cuthbert* case and we agree with him that leave should be given pursuant to section 226(3) of the Companies Act 1965 to the respondent to commence proceedings against Mosbert Berhad (In Liquidation) in respect of her claim to Private Lot No. 460 in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong in the District of Johore Baru.

We turn now to consider the other main ground of appeal.

It is common ground that the respondent had contracted to purchase a private housing lot No. 460 consisting of approximately 6,000 sq. ft. in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong in the district of Johore Baru, one of the two pieces of lands which was proposed to be developed into a housing estate known as Taman Chendrakaseh. It is not in dispute that Johore Grant No. 72 contains an area of 113 acres 2 roods and 20 poles. Learned counsel for the appellant had argued that since the respondent is claiming to have an interest in only 6,000 sq. ft. of the land comprised in Johore Grant No. 72 (which is yet to be sub-divided) she could not lawfully lodge a private caveat expressed to bind the whole of the said land. Such a caveat would be defective and void as being contrary to the express provision of sections 322(1) (b), 323(2) and 324(2) (a) of the National Land Code. In support of his submission learned counsel cited the case of *Tee Chin Yong* v. *Ernest Jeff.*[4] In that case the caveats were lodged against the whole of the two parcels of lands while the claim sought to be protected was based on a contract of sale affecting only a part of the lands. Ismail Khan J. held that the caveats were null and void taking the view that a caveator claiming an interest in a specific portion of the lands was not entitled to lodge a caveat over the whole of the lands. This case was decided under the old F.M.S. Land Code. However, it was followed by two other decisions of the High Court in *Woo Yok Wan* v. *Loo Pek Chee*[5] and *Pok Kew Chai* v. *Yeoh Thian Seng & Anor*[6] under corresponding provisions in the National Land Code. These three cases were reviewed by the Federal Court in *Vangedaselam* v. *Mahadevan & Anor.*[7] In giving the judgment of the Federal Court Suffian L.P. after expressing the view that he did not agree with the judgments of the learned judges in *Tee Chin Yong, Woo Yok Wan* and *Pok Kew Chai* said at page 164:

> "... if you claim a registrable interest in a portion you may caveat the whole land provided that you expressly limit the effect of your caveat to protect only your claim."

This decision was adopted and followed in another Federal Court in the case of *Tan Thean Choo* v. *Cheah Kah Seong & Anor.*[8]

Now, the relevant parts of the private caveat lodged by the respondent read:

> "To:
> The Registrar of Titles,
> Johore Baru.
>
> I, D'Cruz Stella (f) of NRIC No. 0346678/G of Block 94, No. 272G, Henderson Road, Singapore 3 hereby apply for the entry of a Caveat upon the title to the land described in the Schedule below, to be expressed to bind the land itself.
>
> The ground of my claim to the land is that I have entered into an agreement dated April 10, 1967 with Sharikat Mosbert for the purchase of a piece of land known as Private Lot No. 460 comprised in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong in the District of Johore Baru."

In the Schedule the caveat was expressed to bind the whole of Johore Grant No. 72 for Lot No. 83.

It is plain that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to Private Lot No. 460 only. In our opinion, the respondent was not entitled to lodge such a caveat when she is claiming a particular interest containing an area of approximately 6,000 sq. ft. therein. The learned judge seemed to have recognized this and purported to order a remedial affidavit to be sworn by the respondent to rectify this error in the private caveat pursuant to section 417(2) of the National Land Code 1965. In our opinion, sub-section (2) does not empower the High Court to make such an order. The section is of limited application only and is intended to authorise the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the Court affecting the land. It does not, in our judgment, give power to the Court to allow a defective or void private caveat to be amended by the caveator. For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one. This matter appears to have been dealt with in detail by the Privy Council in the case of *Eng Mee Yong & Ors.* v. *Letchumanan*[9] and at page 214 Lord Diplock said:

> "Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law."

For the above reasons we are constrained to disagree with the learned judge of the High Court.

We therefore set aside that part of the Court Order extending the validity of the private caveat lodged by the respondent and order that it be removed from the register forthwith. The appeal is to that extent allowed. However, in the exercise of our discretion we order each party to bear his/her own costs here and in the Court below. The deposit to be refunded to the appellant.

Before departing from this appeal we would like to point out that pursuant to the National Land Code (Amendment) Act 1984 section 322 of the National Land Code 1965 has been amended by substituting the full stop after the words "interest therein" in paragraph (b) with a colon and by inserting the following proviso to sub-section (1) to read:

"Provided that such a caveat shall not be capable of being entered in respect of a part of the land."

This amendment came into force on 25.3.85 and because of this, that part of the judgment of this Court dealing with the private caveat lodged by the respondent now seems to be of academic interest only.

Order accordingly.

Solicitor : *Suppiah & Singh; Syarikat George Puthucheary.*

VENGADASALAM v. KHOR SOON WENG & ORS.

[S.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Abdoolcader S.C.JJ.) August 19 & 23, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 128 of 1984]

Landlord and Tenant – Whether unincorporated society registered under Societies Act has legal capacity to be tenant of premises – Societies Act 1966, s. 9(b).

Club – Whether club has legal capacity to hold tenancy – Societies Act 1966, s. 9(b).

Statutory Interpretation – Purposive and literal construction.

This was an appeal from the decision of the High Court reported in [1984] 2 M.L.J. 230. The issue before the Court was whether a club registered under the Societies Act, 1966 has the capacity to hold a tenancy. Mustapha J. decided that the club has the legal capacity to hold a tenancy. The appellant appealed.

Held: it is settled law that a lease or tenancy cannot be granted to an unincorporated society which has no legal personality as it is only a composite entity of fluctuating content and not a *persona legalis.*

Cases referred to :

(1) *Jarrot* v. *Ackerley* (1915) 113 L.T 371.
(2) *Indo-Australian Trading Co. Ltd.* v. *Hin Ann Huay Kuan & Ors.* [1956] M.L.J. 193.
(3) *Malay Women's Welfare Association* v. *Tan Ek Joo Realty Co. Ltd.* 3 M.C. 101.
(4) *Singapore Shui Hing Company (Pte.) Ltd.* v. *Singapore Sing Hua Poey Chin Association & Ors.* [1976] 1 M.L.J. 217.
(5) *Ang Bock Chwee* v. *Lim Huan Hee & Ors.* [1982] 1 M.L.J. 174.
(6) *Merdeka University Berhad* v. *Government of Malaysia* [1981] 2 M.L.J. 356, 358.
(7) *Foo Loke Ying & Anor.* v. *Television Broadcasts Ltd. & 2 Ors.* [1985] 2 M.L.J. 35.
(8) *Thompson* v. *Goold & Co.* [1910] A.C. 409, 420.
(9) *Vickers Sons and Maxim Limited* v. *Evans* [1910] A.C. 444, 445.

SUPREME COURT.

S.P Annamalai for the appellants.
C. Shanmugaiah for the respondents.

Cur. Adv. Vult.

Abdoolcader S.C.J. (delivering the Judgment of the Court): In these proceedings instituted by the appellant as the landlord of premises No. 287-L, Jalan Aman, Kulim against the respondents as the principal office-bearers of Teo Kheow Club, Kulim ('the club'), an unincorporated society registered under the Societies Act, 1966 ('the Act'), for a declaration that the club is not the tenant of the premises in question, vacant possession thereof and damages, the parties agreed to dispense with evidence on the basis that the crux of the matter involved a pure question of law, and by consent the only and cardinal issue presented for curial determination was whether an unincorporated society has the legal capacity to hold a tenancy in *suo nomine.* Mustapha bin Hussain, J. held that it can and accordingly dismissed the appellant's action.

Proceeding straight to a consideration of the basic issue in question, it is settled law that a lease or tenancy cannot be granted to an unincorporated society which has no legal personality as it is only a composite entity of fluctuating content and not a *persona legalis. Jarrot* v. *Ackerly*(1) is a decision to this effect, and this principle has been consistently followed and applied in a catenation of local cases: *Indo-Australian Trading Co. Ltd.* v. *Hin Ann Huay*